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Case No.

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM RILEY JENT,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

I.

Whether the Florida Supreme Court has declined to conduct the independent determination of the imposition of death sentence this Court in Proffitt v. Florida, 428 U.S. 242 (1976) said that the state court must do, thus rendering Florida's death penalty statute, Section 921.141, Florida Statutes unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution?

II.

Whether the trial court denied Jent due process of law when it ruled that witness Samantha Carver continued to have a Fifth Amendment privilege against self-incrimination for a murder charge which the state did not intend to charge her with committing?

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OPINIONS BELOW

The opinion and judgment of the Supreme Court of Florida sought to be reviewed via this petition is reported as Jent v. State, 408 So.2d 1024 (Fla.1981). It is reproduced in the appendix as item 1. (A1-10)

JURISDICTION OF THE SUPREME COURT

The Supreme Court of Florida issued the opinion and judgment in this case on December 3, 1981. (A1-10) Petitioner filed a motion for rehearing which was denied on February 15, 1982. (A11) Petitioner asserted below and asserts here a deprivation of his rights as guaranteed under the United States Constitution. Title 28 United States Supreme Code, Section 1257(3) and Rule 17 of the United States Supreme Court Rules confers certiorari jurisdiction in this Court to review the judgment in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offen[c]e to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Eighth Amendment to the United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

3. The Fourteenth Amendment to the United States Constitution:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. Section 921.141, Florida Statutes (1980) which is set forth in the Appendix as A11-13.

STATEMENT OF THE CASE

An indictment filed in the Circuit Court for Pasco County on August 29, 1979, charged William Jent and his step-brother, Ernest Miller, with the premeditated murder of a girl identified as "Tammy." (R32-33) Subsequent to their plea of not guilty, they filed several pretrial motions. Of particular importance to this appeal, Jent filed a motion for continuance, (R766-769), because he wanted to depose Samantha Carver who had pled guilty to accessory-after-the-fact to the murder shortly before his trial. Carver, however, still maintained her Fifth Amendment privilege against self-incrimination, and the court denied the motion. (R770)

The court granted a State Motion to Sever (R139;2667) and Jent proceeded to trial on December 17, 1979. (Miller was tried and convicted on November 15, 1979.) He was convicted as charged. (R891)

Subsequently the court sentenced him to death. (R897) The court found as aggravating circumstances that: (1) the murder was especially heinous, atrocious and cruel (R892), and (2) it was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

(R892) The court found in mitigation only that Appellant had no significant history of prior criminal activity. (R893) Section 921.141, Florida Statutes (1980).

Appellant also filed a motion for a new trial (R864-865) and an amended motion for a new trial (R871-876) alleging that someone else had committed the murder. After considering the evidence presented at this hearing, the court denied the motion. (R888-889)

The Florida Supreme Court affirmed the lower court's judgment and sentence. Jent v. State, 408 So.2d 1024 (Fla.1981) (A1-9) The court also denied a subsequent motion for rehearing. (R14)

STATEMENT OF THE FACTS*

The murder giving rise to the charge against Jent ostensibly occurred on the evening of 12-13, July, 1979. The evening began when a group of people consisting of Ernie Miller (co-defendant), Glenna Frye, John Mortolla, Patricia Tirikaine, and Carlena Jo "C.J." Hubbard, left the Caboose Bar in Dade City. (R1976) They made a brief stop at Jackie's Pub (R1577), another bar, and then went to a party at a trestle on the south side of the Lacoochee River in Pasco County. (R1637) Jent, Samantha Carver and a man known only as Ricky were already there. (R1619) By the time Hubbard and Tirikaine arrived, they were well on their way to being drunk or, as Hubbard said, "Higher than high." (R1601,1623) The area apparently did not have any sticks to use for firewood, so they lit the area with candles. (R1681)

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* The three eyewitnesses to this murder have severe credibility problems. Each has given several inconsistent stories of what did or did not happen on the night of the murder. C.J. Hubbard was drunk, or, as she said, "Higher than high." (R1580) Patricia Tirikaine was also drunk (R1621), has memory problems (R1630), and has needed psychiatric care in the past. (R1635) Glenna Frye was a drug addict. (R1685-1687)

Sometime during this party, Hubbard went up the river a short way. (R1581) She heard some screaming and returned and saw Jent and Miller hitting a girl. (R1583) How the girl, who Hubbard first called Elizabeth (R1607) but later said was called Tammy, arrived at the river is unknown because she did not come with Miller and his group (R1629), and apparently was not at the river when they arrived. (R1613) Moreover, no one seems to have known her or where she came from. (R1614) In any event, according to Frye this beating started because Carver and Tammy were fighting. (R1640-1641) Jent pulled Carver off of Tammy and then began to beat Tammy. (R1642-1643) Miller, who was standing next to Frye, then joined the beating. (R1643) They hit the girl so often and hard that "her face was horrible." (R1705) Miller told Frye to hand him a stick which she did. (R1643) He then beat her some more with the stick. (R1644) The girl by this time was unconscious and Jent said she was dead. (R1617) Miller then told everyone to get in the car (R1587), and he and Jent carried the girl and placed her in the trunk of Miller's car. (R1645)

They returned to Miller's house. (R1648) The girl was taken out of the trunk, laid on the back of the trunk and raped by four men, including Jent and Miller. (R1667-1670) Frye, Tirikaine and Hubbard watched. (R1668)**

The girl was placed back in the trunk and Miller told everyone they were leaving. (R1666) Again everyone, except Ricky, who had passed out in Miller's house (R1671), climbed into the car and then the group headed for the Richloam Game Preserve. (R1671) Once there Miller told everyone to get out. (R1672) Jent and Miller lifted the girl out of the trunk and laid her on the ground in front of the car. (R1673) The girl

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** Frye, however, is the only one who claimed to have seen the rape.

woke up, but Jent knocked her down. (R1673-1674) Miller poured some gas on her and then set the gas on fire. (R1595)

The body was discovered on the afternoon of July 13 by a rancher looking for some stray cattle. (R1507)

Another explanation of how the body got to the Richloam Game Preserve exists, however.

Gail Bradshaw and her boyfriend, Bobby Dodd, lived in a trailer in Dade City. (R2345) Her sister, Glenda Branch, also lived in the vicinity. (R2344) The relationship between Bobby and Gail, however, was strained. Gail, a number of times, had threatened to turn Bobby over to the law. (R2377) Bobby, a karate expert (R2376), had in turn threatened to kill Gail. (R2377)

Events culminated sometime during the week prior to July 13. On July 10, Gail called her sister and asked if she could move in with her. (R2347) On that Friday, Bobby, Gail and the next door neighbor, Elmer Carroll, left in Bobby's car and eventually the trio stopped at the Richloam Game Preserve. (R2365) At the game preserve Bobby wanted to have sex with Gail, but she demurred because Carroll was present. (R2370) Dodd then took out a knife and cut off some of Gail's hair. He began taunting her about her threats to turn him in and finally, he grabbed her by the neck and hit her head on the ground two times. (R2372) She lost consciousness. (R2373) Bobby then poured some gas on her and lit it while Carroll looked on. (R2374)

Carroll and Dodd returned to their trailers the next morning. (R2374) When Tina Marvin, Carroll's pregnant girlfriend, asked where Gail was, they said she had been left in Tampa. (R2375) Dodd, to insure Carroll's silence, said he would do the same thing to Tina if anything ever got out about the murder. (R2376)

By this time Carroll was very nervous and drinking and using drugs more than usual. (R2435) When he learned that

the body had been discovered, he told Tina to sell everything because they were leaving. (R2438) They headed north, but their car broke down in Georgia. (R2439) Carroll then told Tina what had happened to Gail. (R2440)

REASONS FOR GRANTING THE WRIT

I.

THE FLORIDA SUPREME COURT HAS DECLINED TO CONDUCT THE INDEPENDENT DETERMINATION OF THE IMPOSITION OF DEATH SENTENCE THIS COURT IN PROFFITT v. FLORIDA, 428 U.S. 242 (1976) SAID THAT THE STATE COURT MUST DO, THUS RENDERING FLORIDA'S DEATH PENALTY STATUTE, SECTION 921.141, FLORIDA STATUTES UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In Proffitt v. Florida, 428 U.S. 242, 49 L.Ed.2d 913, 96 S.Ct. 2960 (1976) this Court approved Florida's Death Penalty Statute, Section 921.141, Florida Statutes (1976). A key factor in upholding its constitutionality was the role the state supreme court played in insuring that the death sentence was not imposed in an arbitrary or capricious manner.

> The Florida capital-sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner. Moreover, to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida "to determine independently whether the imposition of the ultimate penalty is warranted." Songer v. State, 322 So.2d 481,484 (1975). See also Sullivan v. State, 303 So.2d 632,637 (1974)

Id., at 252-253.

Early Florida Supreme Court cases emphasized this independent evaluation and reweighing function by referring to Florida's trifurcated sentencing process. Alvord v. State, 322 So.2d 533 (Fla.1975); Tedder v. State, 322 So.2d 908 (Fla.1975).

The jury, the judge and the Florida Supreme Court have significant functions in determining the appropriatness of a death sentence. Such intimate involvement with the facts of a case, the credibility of witnesses and the correctness of a sentence is a radical departure from the normal appellate function of reviewing only legal errors. Nevertheless, the Florida Supreme Court accepted this unique burden in order for the State to have a constitutional death penalty statute.

It now appears, however, that that burden has proven too heavy, and the State Supreme Court has unloaded itself of some of the tasks it said it would perform in capital cases. Specifically, the court has refused to reweigh evidence and conduct the independent evaluation of the evidence this court in Proffitt said the Florida Supreme Court would do. Brown v. Wainwright, 392 So.2d 1327,1331 (Fla.1981) In Brown, all the Florida death row inmates challenged the Florida Supreme Court's practise of considering, in the course of reviewing sentences of death, documents which were not made available to the Defendant's counsel.

In rejecting that challenge, the Florida Supreme Court said:

> [4] This Court's role after a death sentence has been imposed is "review," a process qualitatively different from sentence "imposition." It consists of two discrete functions. First, we determine if the jury and judge acted with procedural rectitude in applying section 921.141 and our case law.
>
> * * *
>
> The second aspect of our review process is to ensure relative proportionality among death sentences which have been approved statewide. After we have concluded that the judge and jury have acted with procedural regularity, we compare the case under review with all past capital cases to determine whether or not the punishment is too great. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); State v. Dixon, 283 So.2d 1 (Fla.1973), cert.denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

> [5,6] Neither of our sentence review functions, it will be noted, involves weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances. Our sole concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances. If the findings of aggravating and mitigating circumstances are so supported, if the jury's recommendation was not unreasonably rejected, and if the death sentence is not disproportionate to others properly sustainable under the statute, the trial court's sentence must be sustained even though, had we been triers and weighers of fact, we might have reached a different result in an independent evaluaton.
>
> It is not the function of this court to cull through what has been listed as aggravating and mitigating circumstances in the trial court's order, determine which are proper for consideration and which are not, and then impose the proper sentence. In accordance with the statute, the culling process must be done by the trial court.

Id. at 1331-1332, footnotes and certain cites omitted.

Jent is a victim of this retreachment. On appeal he asked the court, in accordance with one of its cases, Tibbs v. State, 337 So.2d 788 (Fla.1976), to reweigh the evidence used to convict him. There certainly was reason to do so. The primary evidence used to convict and sentence Jent was the testimony of three women and a single three-quarter inch strand of hair found at the murder site. But the girls who had claimed to have seen the murder had each given several different versions of what had or had not occurred. And they either had mental problems or were so drunk that they were unaware what, if anything, happened. Similarly, the hair strand was found four days after the murder and three days after the body had been discovered and removed.

The Florida Supreme Court, however, had receded from Tibbs, and in Tibbs v. State, 397 So.2d 1120 (Fla.1981) it said that is proper function was to review, not reweigh the evidence.

In this case the Florida Supreme Court has extended Tibbs II to the sentencing process for capital cases. (Slip opinion at page 4, footnote 8.) Because the Florida Supreme Court no longer reweighs the evidence or otherwise independently evaluates the evidence in any phase of a capital case, there is naturally no merit to a claim that the court erred in not finding the "weakness" of the evidence as a mitigating factor. (Id., footnote 8.)

Thus, Jent is asking this Court to examine whether Florida has abandoned a crucial part of Florida's Death Penalty scheme.

The importance of this issue is obvious. Capital punishment, by virtue of its finality, is qualitatively different from any other form of punishment available to the State. And this Court has carefully monitored Florida's efforts to enact a constitutional death penalty statute and procedures to implement that statute. See, e.g., Gardner v. Florida, 430 U.S. 349, 51 L.Ed.2d 393, 97 S.Ct. 1197 (1977). If Florida refuses to do what this Court in Proffitt said it would do, then this Court should re-examine Florida's sentencing procedures and if necessary, remind the State of the promises it made in Proffitt.

Further, this case presents this Court with vehicle by which it can conduct this re-examination. The heinousness of the murder was the only factor aggravating this murder. Miller v. State, __So.2d__ (Case No.58,795, opinion filed March 25, 1982)(McDonald concurring) And it evidently outweighed the mitigating factor of Jent's lack of prior criminal record. (R892-893) Yet, the evidence supporting the aggravating factor is extremely questionable; but this fact was rejected by the State Supreme Court as a mitigating factor to be considered.

Consequently, by refusing to reweigh this evidence, has Florida introduced constitutionally unacceptable level of

arbitrariness and caprice into its capital sentencing structure? That is the question this case presents to this Court.

II.

THE TRIAL COURT DENIED JENT DUE PROCESS OF LAW WHEN IT RULED THAT WITNESS SAMANTHA CARVER CONTINUED TO HAVE A FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION FOR A MURDER CHARGE WHICH THE STATE DID NOT INTEND TO CHARGE HER WITH COMMITTING.

On December 13 or 14, 1979, Samantha Carver, an alleged witness to the murder of Tammy, pled guilty to accessory-after-the-fact. (R1976) In return for her plea, "the State would not proceed on any higher crime against Miss Carver based upon the facts surrounding this incident." (R1983,1984)

Immediately after her change of plea, Jent's attorney sought to depose her,[1] but Carver, upon advice of her counsel, invoked her Fifth Amendment privilege to remain silent. (R1977) Defense counsel then approached the court with a motion to continue so he could depose Carver. In order to rule upon that motion, however, the court first considered whether Carver still had a Fifth Amendment privilege to assert.

The State, supporting the contention that she had that right said,

> ...I would think that if she would come forward, testify she did have knowledge or did not have knowledge and testified inconsistently with her prior statement,[2] then that would be a perjured statement at least of what she has said previously....

(R1981)

* * *

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[1] Authorized by Rule 3.220, Florida Rules of Criminal Procedure.

[2] See Record 1991-1992.

> Your Honor,...accessory after the fact would not be a lesser included offense of the crime of murder and, therefore, we would not be precluded from going forward should the facts become available, and I have no idea how they would become available, but should they become available, this case [Newkirk v. State, 222 So.2d 435 (Fla.3d DCA 1969)] indicates we are not precluded from charging her with murder in the first degree should those facts become available.

(R1988)

The court, relying upon this speculation, held that Carver still had a Fifth Amendment privilege to assert and denied the motion to continue. (R1992) But the fundamental issue the trial court missed and the Florida Supreme Court ignored was whether the State could suppress Carver's testimony by raising the possibility that it may at some time in the future have sufficient evidence to charge her with murder. Thus, the effect of this ruling was to forever foreclose Jent from discovering what Carver had to say.

In the balance here are two competing interests. First, society has a significant legitimate interest in punishing those guilty of a crime. On the other hand, a criminal defendant as well as society "...has a right to everyman's evidence" unless some privilege conditions that duty. United States v. Mandujano, 425 U.S. 564, 48 L.Ed.2d 212, 96 S.Ct. 1768 (1976) In this case, as long as the State could hold the possibility of a murder charge over Carver's head,[3/] she had a legitimate Fifth Amendment privilege to exert. The question is whether, under principles of due process it was fair for the State to forever hold open this option in order to suppress her testimony when it never expected to charge Carver with murder? (R1988)

In Brady v. Maryland, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963) this Cort held that it was a violation of due

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3/ In Florida there is no applicable statute of limitations for murder. Section 775.15(1), Florida Statutes (1980).

Process for the State to suppress material evidence requested by the defendant. Id at 87.

Here the materiality of Carver's testimony is, of course, unknown because she asserted her Fifth Amendment right against self-incrimination. Nevertheless, the thrust of Brady is that justice is served when trials are fair. Withholding evidence from the defense whether through the nondisclosure of Brady evidence or by threats of prosecution as was done in this case does not serve to ensure fair trials.

This case, moreover, does not present the situation of whether the State could or could not have charged Carver with murder. By the time Jent sought to depose Carver, the State had thoroughly investigated its case and had, in fact, convicted Miller, Jent's co-defendant, of murder. Clearly, the State knew the facts and Carver's involvement in it. Thus refined, the question presented here is whether, given the State's extensive knowledge of the case against Carver, and its declared intention not to prosecute her for any higher crimes, was it fair to suppress her testimony by threats of a speculative prosecution sometime in the future.[4/]

4/ The three eyewitnesses to the murder who testified at trial were charged with accessory after the fact but were told they would not go to jail if they told the truth. (R1678) They were never charged with or prosecuted for the murder.

CONCLUSION

For the reasons stated, Petitioner asks this Court to grant a writ of certiorari.

Respectfully submitted,

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